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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARCIA MELENDEZ, ET AL.,

4 Plaintiffs,

5 v.

20 CV 5301 (RA)

Videoconference

6 Oral Argument

7 THE CITY OF NEW YORK, ET AL.,

8 Defendants.

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9 New York, N.Y.

10 September 11, 2020

3:35 p.m.

11 Before:

12 HON. RONNIE ABRAMS,

13 District Judge

14 APPEARANCES VIDEOCONFERENCE

15
16 PATTERSON, BELKNAP, WEBB & TYLER, LLP

Attorneys for Plaintiffs

17 BY: STEPHEN P. YOUNGER

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1 (The Court and all parties appearing via videoconference)

2 THE COURT: We are here for *Melendez v. The City of*
3 *New York*. Could plaintiff please state the appearances.

4 MR. YOUNGER: Yes. It's Stephen P. Younger and
5 Alejandro Cruz from Patterson, Belknap on behalf of the
6 plaintiffs. We are only seeing a blank screen. I don't know
7 if you are.

8 THE COURT: I can see you and I can see Ms. Koplik. I
9 can't see anyone else.

10 (Pause)

11 Do you want to sign out and sign back in? Sometimes
12 that helps.

13 MR. YOUNGER: Yes.

14 (Pause)

15 THE COURT: We are here to discuss plaintiff's motion
16 for preliminary injunction and defendant's motion to dismiss.
17 As I noted, this is a public proceeding. Members of the public
18 are able to access this argument today through the public
19 call-in number.

20 We are holding the hearing via Skype for Business;
21 although, due to bandwidth issues, only the parties have access
22 to the video feed, but again, the public has access to the
23 audio feed. The platform is a little bit new to us; so I
24 appreciate the parties' patience, and I think we've already
25 figured out and addressed some of the kinks.

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1 I'm going to start with plaintiffs' counsel, and
2 before I hear you out, I just would like you to confirm which
3 plaintiffs are now bringing which claims with respect to the
4 Residential Harassment Law, Commercial Harassment Law, and
5 Guaranty Law. So if you could just clarify that for me, I'd
6 appreciate it.

7 MR. YOUNGER: Thank you. I think, as a result of the
8 recent letters, there's no dispute about standing. So just for
9 the record, as to the Residential Harassment Laws: Plaintiffs
10 Melendez, 1025 Pacific, Yang and Haight Trade have standing;
11 for the Commercial Harassment Law: Plaintiffs Melendez and
12 Jarican have standing; and then finally, for the Guaranty Law:
13 Plaintiffs Bochner and 287 7th Avenue have standing.

14 And I don't think that there should be any dispute
15 about that at this point.

16 THE COURT: With respect to Bochner, he's not a party
17 to the pending motion for preliminary injunction, correct?

18 MR. YOUNGER: Well, actually, we've filed a proposed
19 amended notice of motion to join him to the motion, and I
20 think, based on the city's letter, I didn't think they really
21 had an objection to that, since it's exactly the same issues as
22 were brought by plaintiffs.

23 THE COURT: All right. I'm just going to clarify
24 that.

25 Is that right, Ms. Koplik?

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(Pause)

MS. KOPLIK: Sorry. I apologize. I was on mute.

So the documents that were belatedly provided to us do seem to establish that new plaintiffs appear to have standing. We, I do not think, have an objection to the motion for preliminary injunction being as to those plaintiffs as well.

Carlos, did you want to add anything to this?

MR. UGALDE ALVAREZ: I don't have much to add. I would just note for the record that the notice of motion was filed together with the letter that was filed on Wednesday at 12:00 p.m.; so we didn't really have an opportunity to respond to that. But I guess, you know, with respect to what Ms. Koplik said, I don't think we have an objection for those plaintiffs to be joined to the request.

THE COURT: Okay. All right. Thank you.

Mr. Younger, do you want to get started? I'm happy to hear you out.

MR. YOUNGER: Thank you. I want to thank you for the convenience of virtually today, your Honor.

Just for priority sake, I'm going to be addressing First Amendment and preemption. My colleague, Mr. Cruz, will cover the contract clause.

THE COURT: Okay.

MR. YOUNGER: So in short, this case is about property owners who are having serious troubles collecting rent because

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1 of these three new city laws. The Harassment Laws are
2 inhibiting them from taking routine steps to collect that rent,
3 and the Guaranty Law prevents landlords from enforcing personal
4 guaranties that are a critical remedy in the event of a
5 default.

6 THE COURT: Okay. So walk me through exactly what
7 your clients are prevented from doing, in your view?

8 MR. YOUNGER: In our view, there are certain statutory
9 notices that they have to send before they can bring a claim.
10 They're required by law. And so they can't send a rent demand,
11 and they can't send a follow up to that, what's known as a
12 dunning notice, and they can't even discuss the consequences of
13 the rent issue. And that's set out in their declarations.

14 It's not disputed by the city. They submitted no
15 evidence to dispute that statement. And the reasonableness of
16 this is based on two facts; one, there is a huge, Draconian
17 penalty if they're wrong about this. One, they have
18 substantial fines; two, punitive damages and even legal fees.

19 But second, if you look at Plaintiff Melendez, she was
20 the target of a harassment claim just for having demanded rent
21 from one of her residential tenants. So she is reasonably in
22 fear of taking steps.

23 The problem is the city is taking this hyper-technical
24 view of these laws. It's not borne out by the real world.
25 What's happening in the real world? First, you see what's

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1 happening to the plaintiffs, but you also see what's happening
2 in real lawsuits. One, the two lawsuits by The Gap and Old
3 Navy, who have asserted harassment simply based on a rent
4 demand, which is what the city says can't happen.

5 Well, it's happening. It's playing out in two major
6 cases in the City of New York. They say it's just a
7 frustration-of-purpose case. Wrong. The complaint makes a
8 claim for harassment. It's also set out in *The Maramont* case.
9 *Maramont* is suing for civil penalties, punitive damages and
10 legal fees simply because their landlord challenged their
11 ability to pay rent for the pandemic. And so the real world is
12 showing us that this is the right interpretation.

13 THE COURT: Have any courts ruled on that and found
14 harassment to exist just by virtue of sending rent demands,
15 follow-up notices or even eviction notices?

16 MR. YOUNGER: Not as of yet. You know, the courts are
17 severely underwater in the state. The laws were only passed in
18 May but, you know, serious law firms in serious cases involving
19 well-financed tenants have made these arguments. And which is
20 another problem with these laws, that they're being taken
21 advantage of by, you know, major corporations who shouldn't be
22 the benefit of a law like this.

23 The next thing is if you just look at the text of the
24 law, the text of the laws prevent threatening a tenant based on
25 their status of having been affected by the Covid-19. Now,

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1 it's conceded that the term "threat" must be read in its plain
2 meaning. In the *Davila* case, the Second Circuit said "threat"
3 means making a declaration of loss or damages based
4 conditionally upon some future course, and that's exactly what
5 we have here.

6 The landlords would be threatening the tenants with a
7 loss, meaning having to pay rent, based on their future
8 conduct. This is seen most dramatically in a trigger that the
9 city doesn't really mention, which is the rent concession
10 trigger.

11 You could be liable under this law simply because a
12 landlord did the right thing and said, you know, we're in the
13 summer, come back to me in November and you'll pay your rent
14 then. When they don't pay the rent in November, they're
15 subject to harassment claims. And that's true, in a survey
16 that we put before the Court, for two-thirds of the commercial
17 landlords in the city, just having done the right thing by
18 giving a rent concession.

19 Now, the city's argument is relying heavily on the
20 term "based on," but they admit that under typical causation
21 standards, it doesn't have to be the sole cause of the claim.
22 So, for example, as the city's amicus admits, in many cases,
23 the Covid-19 status will be the cause of the inability to pay
24 rent and that inability to pay rent would, in turn, be the
25 basis for the rent demand.

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1 So the two are inextricably intertwined. In many of
2 these cases, just having the Covid status will mean they can't
3 pay rent. They need to pay the rent. So what the city points
4 to is a savings clause in this action, but --

5 (Pause)

6 THE COURT: And we'll all, when we're not talking,
7 mute ourselves and myself included.

8 But just to be clear, the Commercial Harassment Law
9 has a savings clause but the Residential Harassment Law does
10 not; is that right?

11 MR. YOUNGER: That's correct. So this argument
12 doesn't apply to Residential Law, but even the Commercial Law,
13 the city admits, it doesn't say a rent demand. And so what
14 they're saying is implied in that savings clause is that you
15 can make a rent demand, but that's contrary to New York law.

16 And I'd like to cite the *Farnham* case, 83 N.Y. 2d 520,
17 where the Court of Appeals has said exceptions have to be
18 narrowly construed. You can't read things into exceptions. If
19 they're not in the exception, they aren't in the statute. So
20 rent demands are not saved by this savings clause.

21 But even if the city was right about the First
22 Amendment, they're not saved still because we still have the
23 State constitutional protections. As we know, the New York
24 State Constitution is written more broadly because we have a
25 history in New York, which predates the Bill of Rights,

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1 protecting free expression and it includes both the word
2 "restrain" and "abridge."

3 And so this negates the city's entire argument when
4 you get to the State Constitution because, as the *Acara* case
5 said, it protects against incidental impacts on free speech.
6 So it's not just a direct abridgment nor a direct prohibition.
7 It's an incidental effect. As the Court of Appeals has said,
8 the test is who is hit by a statute, not just who it's aimed
9 at. And clearly here, these defendants have been hit by this
10 statute.

11 So if I could --

12 THE COURT: No. Sorry, I was just going to ask you.
13 Have the courts considered the constitutionality of the New
14 York State Harassment Laws pre-Covid? So not these particular
15 provisions, but I understand that section F7 was recently
16 added. I think I said State, but I meant city Harassment Laws
17 have been around for a while, and I'm wondering, in your view,
18 if there's a distinction in terms of the constitutionality of
19 the other Harassment Laws and these newer ones?

20 MR. YOUNGER: Yeah, and so the one case that they cite
21 is the *Prometheus* case and, first, it wasn't a free speech
22 challenge; it was only a due process challenge. And, second,
23 it dealt with the words "threats of force." You know, a threat
24 of force is something different than a threat based on a rent
25 concession, or something which is so broad that it covers

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1 millions and millions of New Yorkers.

2 These are threats that would be more in the
3 traditional sense, where you'd know, when you were making the
4 threat, that you had, you know, done something bad. You had
5 threatened someone because of their race. You threatened
6 someone by using force against them or changing their locks.

7 Here, a lot of the triggers, you wouldn't even know.
8 How would you know whether a tenant is caring for someone who
9 has Covid? How would you know they are partly unemployed?
10 Some of these triggers are just so widely cast, that really
11 what they are intended to do is to cancel rent, which is
12 something that the Speaker or City Council said when he
13 introduced these bills.

14 So if I could turn to the *Central Hudson* test?

15 THE COURT: Yes, why don't you? And while you're
16 talking about *Central Hudson*, I'd also like to hear if more
17 recent decisions, like *Reed* and *Sorrell*, affect the
18 applicability of *Central Hudson* in your view. But, please, go
19 ahead.

20 MR. YOUNGER: Yes. So in the Second Circuit, the
21 Second Circuit has said, we still apply *Central Hudson* even in
22 the face of *Sorrell*. There has been some question, but most
23 circuits have said, we still go with *Central Hudson*; so I think
24 we're obliged in the Second Circuit to follow *Central Hudson*.

25 But it is now the city's burden, not ours, to show two

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1 things: One, that these laws directly advance a substantial
2 interest; and two, that they're narrowly tailored. In our
3 view, they flunk both.

4 On the advancement prong, they can't rely on just
5 speculation or conjecture. And you heard the city say, we have
6 boxes and boxes of testimony, but there's not a single piece of
7 testimony about any harassment by a landlord of a tenant, not a
8 single piece of evidence.

9 You can -- you know, we've had four rounds of briefing
10 here and nobody's pointed to any of that. All that they've
11 said -- the only thing they could muster is that someone
12 remarked that landlords may resort to threats -- "may" --
13 without any proof, without any citation of anything. And you
14 can look at the *Wollschlaeger* case, where the 11th Circuit
15 said: Six anecdotes were insufficient. This is just pure
16 speculation.

17 But I think that the second point is that there's so
18 many less-restrictive alternatives that are obvious here. One,
19 they could have had an injury requirement. Then you wouldn't
20 have these major corporations, like The Gap and Old Navy,
21 invoking these laws. Two, they could have had a direct
22 causation test, or they could have explicitly excluded rent
23 demands in the savings clause. There's so many things they
24 could have done so that you would not have infringed on free
25 speech rights.

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1 But I think the most important thing is these laws are
2 so broad, so far reaching, they cover virtually anybody that's
3 been in New York since last March, and so that is the
4 antithesis of a narrowly drawn statute.

5 They do not challenge our data, which is in the
6 declaration, showing each one of these classes, how many people
7 fall into it, and it's millions and millions of people. They
8 don't challenge the data from this recent survey showing that
9 two-thirds of all small property owners surveyed have given a
10 rent concession; so they're at risk of harassment.

11 And by the way, the rent-concession prong has advanced
12 none of the interests that they said. How does giving a rent
13 concession that someone doesn't pay amount to harassment of a
14 tenant? I mean, it doesn't advance their interest at all.
15 They've never even explained it.

16 And the fact that well-capitalized tenants, like The
17 Gap and Old Navy and Maramont, can take advantage of these laws
18 means that they're not narrowly tailored and that they violate
19 free speech.

20 So unless there are other questions on free speech, I
21 would like to turn it over to my colleague, Mr. Cruz.

22 Oops, I think you're muted.

23 THE COURT: Just to follow up on your points regarding
24 harassment, don't tenants, even tenants that are not in
25 financial distress, also need protection from harassment by

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1 landlords?

2 MR. YOUNGER: Well --

3 THE COURT: I mean, what if a landlord threatens a
4 tenant who's an essential worker, for example, you know, like a
5 doctor or a nurse or someone who is, you know, sick with Covid?
6 So it's not based on economic need?

7 MR. YOUNGER: That would be a valid argument if it
8 wasn't so broadly drawn, right, if you didn't have it covering,
9 you know, virtually any New Yorker. If there was a narrowly
10 tailored, you know, prescription here about people that -- and
11 you had something which was directly tied to that status, you
12 might have an argument.

13 But given that, you know, someone like The Gap can
14 claim to be harassed, given that someone got a rent concession
15 and now hasn't paid that rent concession can claim to be
16 harassed, it is so overly broad that it's far beyond what that
17 purpose that they say it serves actually, you know, goes about
18 doing.

19 THE COURT: I also wanted to ask about your vagueness
20 argument. Is your challenge facial or as applied?

21 MR. YOUNGER: Well, I will turn to Mr. Cruz for that.

22 THE COURT: Okay.

23 MR. CRUZ: Good afternoon, your Honor.

24 THE COURT: Good afternoon.

25 MR. CRUZ: So as to your Honor's question, with

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1 respect to the vagueness challenge, I think on this front the
2 issue here is that these particular laws, No. 1, leave
3 plaintiffs, and frankly probably many other New Yorkers,
4 guessing as to what's covered. So this is, as applied to them,
5 to the extent they are subject to these laws, clearly, and they
6 are there left to wonder. And I think that -- you know, that's
7 point one.

8 And the second point, as for the second prong of the
9 vagueness challenge under the Fourteenth Amendment, you're
10 looking at the fact that for many of the reasons that
11 Mr. Younger articulated about the law and many of the reasons
12 that the law, for example, with respect to what Covid-19 status
13 is or isn't, doesn't provide any enforcement mechanism or at
14 least guidance as to how this law has to be enforced.

15 So I think this law straddles the two prongs of the
16 vagueness challenge. And to the extent the plaintiffs here are
17 subject to the Fourteenth Amendment, this is something that
18 would be applied to them, but I think it's much broader than
19 that as well.

20 THE COURT: My understanding, you're not challenging
21 Governor Cuomo's Executive Order 202.28, which prohibits
22 landlords from harassing, threatening or engaging in any
23 harmful act to compel a tenant to enter into an agreement to
24 use his security deposit as rent.

25 An executive order does not define threaten. So my

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1 question is: Why are these Harassment Laws void for vagueness
2 but that executive order is not?

3 MR. CRUZ: Well, I think the executive order that you
4 just read, your Honor, is very different from the statute here.
5 As we point out in the briefing, the statute here takes the
6 word "threaten," which as a matter of law and which is
7 uncontested by the defendants, by the city, has a definition
8 that is much broader than what is defined in that executive
9 order that you read.

10 And just to be clear, we are not challenging any of
11 the Governor's executive orders. But to the extent that -- I
12 think the language that your Honor just quoted, it's not merely
13 a broad, sort of all-encompassing, ambiguous threat; anything
14 that has to do with rent and any kind of consequences I throw
15 at you. The Governor's executive order there tailors as to
16 what is a threat and tells you what the result has to be to
17 become a threat. And I think there's a big difference between
18 the words of that executive order and the statute here, which
19 is much broader.

20 THE COURT: All right. You may proceed.

21 MR. CRUZ: Thank you, your Honor.

22 So I want to address the contract clause issues, and
23 if your Honor -- if it works for your Honor, I want to
24 highlight a couple of points, first, with respect to the issue
25 of the substantial impairment; and second, with respect to the

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1 reasonableness and necessity and sort of fit between the
2 Guaranty Law or lack of fit, is our position, between the
3 Guaranty Law and the purported purpose.

4 So, first, the contracts clause, to implicate the
5 contracts clause in the first place, we need to talk about what
6 the substantial impairment is. And I think it's worth stepping
7 back for a moment to think about just how uniquely substantial
8 this particular impairment is because the Guaranty Law
9 permanently extinguishes debt obligations that were central to
10 the parties' reasonable expectations when they entered that
11 guaranty agreement, and it does that with no recourse to the
12 landlord ever.

13 So, for example, with Mr. Bochner, this is going to
14 mean for his business a loss of over a hundred thousand dollars
15 in rent that was never paid to him by the tenant and that was
16 guaranteed to that business by the principal of the tenant.
17 That's almost a year and a half of taxes. And we know from his
18 declaration that the tax liability on that building, we know
19 from his declaration, that he individually has already had to
20 go into his pocket for about \$35,000 to keep that building up
21 to date on its taxes.

22 And I don't want to forget Ms. Yang, who's no longer a
23 plaintiff as to the contract clause. But the reason for that
24 is because, as in the Contract Law -- the Guaranty Law, excuse
25 me. But the reason for that is because she was forced to

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1 settle by extinguishing her claim voluntarily for any back rent
2 just to get the tenant out and get a new tenant in. And I
3 think that's how much pressure the Guaranty Law puts on
4 landlords because they need to get that back rent. Ms. Yang
5 couldn't get it, and she needed to keep her property.

6 Nothing in the law, in the Guaranty Law, preserves
7 what's taken away. Nothing in the law makes property owners
8 whole. Nothing in the law provisions relief on any
9 circumstances tied to its purpose, which is, according to the
10 City Council Speaker, to help small businesses.

11 And on the other side of the equation, this law
12 creates an incredible windfall for guarantors, your Honor, who
13 in the very first instance, as a material inducement to get a
14 landlord to sign a lease, promise to backstop the default on
15 that lease, and they promise to do it personally. And they
16 received the benefit of their tenant being considered
17 creditworthy in signing that lease.

18 Now, the city, I think, as notable, cites not a single
19 case in their briefing where a court has upheld something like
20 this, which is the targeted extinction of a private debt
21 obligation in perpetuity, with no mechanism to make it whole.

22 THE COURT: Wait. Just let me stop. When you say "in
23 perpetuity," I mean, right now, the Guaranty Law is expected to
24 end September 20th, right? But there was mention in a recent
25 letter that it might be extended to March 2021.

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1 MR. CRUZ: Well, your Honor, I think there's -- I'm
2 sorry. I didn't mean to interrupt you.

3 THE COURT: No, no, no. Go ahead. I was going to
4 follow up on your point about there being a deadline, but then
5 I was also subsequently going to ask if the city did decide to
6 extend the Guaranty Law, how that plays into the analysis.

7 MR. CRUZ: Well, I think the short answer as to how
8 the potential extension plays into the Guaranty Laws, that it's
9 only going to weaken the city's position because it's only
10 going to make the impairment here even more substantial.

11 I want to break this apart, your Honor, because your
12 question implicates a very important piece of what the nature
13 of this impairment is. I say it's permanent and I say it's in
14 perpetuity because the city points and says, look, there's a
15 temporal limitation on this law. It's only for six months. It
16 may become a year, and it may become later.

17 But the fact is is that temporal limitation doesn't
18 make it not permanent because it only defines the scope of
19 what's taken away. Right now, there are six months' of a debt
20 that a guarantor promised to pay that are completely
21 extinguished. And the text of this statute is telling. It
22 says: These guaranties shall not be enforceable -- full
23 stop -- against such natural persons if the following
24 conditions are met.

25 And the condition as to time, I think interestingly,

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1 in the statute -- if you read it, it's clear -- is that the
2 default or other event causing such natural persons to become
3 fully or partially liable occurred between March and September.

4 So it's not that the debt is delayed in this case,
5 such as it was in the *Elmsford* case that Judge McMahon decided
6 a couple of months ago. This is six months of debt, maybe
7 more, that goes away forever and can never be collected or
8 enforced by the person who -- by the landlord. And I think
9 that what's notable too is even if they try to enforce it, they
10 would be subject to a harassment claim by the person against --
11 by the guarantor themselves.

12 I'm sorry, your Honor. You may be on mute.

13 THE COURT: I know. I'm sorry. I'm sorry. I had a
14 couple of particular questions about Bochner. Has he tried to
15 recoup the rent owed to him from March through September by any
16 other means? So this is just another way of asking: Why is
17 the personal guaranties his only recourse?

18 MR. CRUZ: Well, your Honor, this gets to the core of
19 why people enter these personal guaranties. I think as a
20 factual matter, Mr. Bochner has many months of unpaid rent, and
21 as is in his declaration, Sunburger has given him a six-months'
22 notice, as is required under their good-guy guaranty, and
23 mailed him the key. They say, we're going to give you
24 possession in September.

25 And so I think when you sort of look at the

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1 relationship between the lease and the guaranty -- and this is
2 part of the city's argument -- why did they need the guaranty?
3 Why is the impairment so substantial if they still have
4 remedies under the leases?

5 But the remedy under the lease is not real anymore.
6 The tenant is -- tenants, just like many, as Mr. Golino says,
7 and this is undisputed -- is probably judgment proof. There
8 are no substantial assets and eviction is not a real
9 possibility right now because of the eviction moratorium.

10 The city also claims that Mr. Bochner might be able to
11 recover late fees, but again, you can't get that from an empty
12 tenant. And that's the reason these guaranties are sought
13 because, for example, especially with small businesses, the
14 guaranty that is signed, along with the lease, is something
15 that inures to the benefit of both parties.

16 Why? Because for the landlord, it gives the landlord
17 comfort that there is something behind the lease obligation,
18 rather than an empty shell company that signs the lease. But
19 for the small business that is trying to lease space to open
20 that business, to get itself started up and to be profitable,
21 that business may not have credit and certainly that company
22 that is going to be the tenant doesn't have credit. So the
23 guaranty creates a creditworthy situation that landlords are
24 willing to bring into their space, and it creates the benefit
25 of credit for the tenant himself by backstopping the

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1 possibility of a lease default.

2 So at this point, I think getting directly to your
3 question, Mr. Bochner, with already having received a notice
4 that the tenant is going to default, already having received
5 the keys, and having no way to get the rent that he is entitled
6 to under the guaranty, the only thing he can resort to -- short
7 of eviction because eviction is not allowed right now -- is the
8 guaranty itself.

9 And that is the reason behind the guaranty. It's
10 supposed to be -- if you read from Mr. Bochner's lease, it's an
11 unequivocal promise by the individual to pay that rent, and I
12 think notably, it's to pay rent in the case of default, when
13 things go wrong and the tenant can't pay.

14 THE COURT: How is this analysis different from that
15 in the wage freeze cases in which State employees never get the
16 raises that they contracted for?

17 MR. CRUZ: I think it's different for a couple of
18 reasons, your Honor. I think we're talking both about *Buffalo*
19 *Teachers* and the recent *Nassau County* case from the Second
20 Circuit, which I think the Second Circuit actually said was a
21 replay of the *Buffalo Teachers*.

22 The analysis was the same and several aspects of those
23 cases are very different. No. 1, the purpose is entirely
24 different. Here, no one disputes that Covid has created
25 injuries and problems for everyone in New York, but the

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1 purported purpose here of the Guaranty Law is to help small
2 businesses.

3 And that's a law that is very narrow and does not
4 inure to the benefit of the public, which is different from
5 *Buffalo Teachers*, for example, where the benefit to the public
6 was, one, solving a fiscal crisis for the entire City of
7 Buffalo and the frozen wages were going to inure to the benefit
8 of the public fisc. These are benefits that would inure to the
9 entire City of Buffalo and get that budget balanced.

10 I think as a second means of distinction, we have to
11 consider that one of the things that the Second Circuit took
12 into account in *Buffalo Teachers* is that the wage freeze was
13 temporary. That wage freeze was not going to go on forever.
14 It had to be reconsidered on a periodic basis by the city to
15 ensure it was only in effect for a limited period of time. And
16 it was conditioned -- and this is sort of the next part of the
17 analysis -- it was conditioned to fit the shape of the
18 emergency.

19 Here, it's very different. Again, this is an
20 extinction of a debt forever. The six months or a year of debt
21 goes away permanently, with no means of enforcement. Once the
22 current pandemic, once the crisis has passed, whenever that is,
23 landlords can still not collect the six months, half the year,
24 of income that's being taken away here.

25 And I think the third thing that's important to keep

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1 in mind about the wage freeze cases is that to the extent the
2 impairment was no doubt substantial, and Second Circuit held
3 that in both cases, the means of shaping the impairment to the
4 shape of the -- to sort of fit the emergency was a means that
5 balanced it over several different stakeholders.

6 The teachers would not get their wage freeze, but it
7 was prospective. It did not act retroactively. So teachers
8 would keep their salaries and, in the future, they would be
9 given wage freezes. Those wage freezes were delayed. And at
10 the same time, the city was not able to recoup as much money as
11 it wanted to.

12 And there was actually, I think, I believe the Second
13 Circuit looked at some of the legislative history in Buffalo
14 that said that there were sort of other alternatives considered
15 and the city wanted to do more, but it couldn't. So that
16 balanced the burden. It didn't just take from one and create a
17 zero sum gain.

18 So I think there are a lot of different distinctions
19 between the wage freeze cases and this one at stage here.

20 THE COURT: All right. You may proceed. Thank you.

21 MR. CRUZ: Thank you.

22 I think, you know, that brings us into the realm of
23 the necessary and -- the reasonable and necessary prong of the
24 analysis, your Honor, when talking about those types of cases.

25 And I think regarding that prong, that issue of stay

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1 between the shape of the crisis and the shape of the impairment
2 at stake, the city, I think, they argue for sort of deference
3 across the board. And I think that that argument is very
4 misplaced if you look at the case law, your Honor. Because for
5 nearly 90 years now the Supreme Court has consistently
6 evaluated "reasonable" and "necessity" under the contracts
7 clause by assessing a challenged law's fit with the purported
8 interest, especially where there's no dispute that a broad
9 community crisis exists.

10 And they look at three main pieces here: The
11 impairment that's in place is temporary; that the impairment is
12 conditioned on the shape of the crisis; and that there's a
13 means to make people whole. And the Supreme Court has never
14 characterized this as a rational-basis test, not once.

15 What is clear, though -- what is clear is that the
16 starting point of the analysis as to what's reasonable and
17 necessary starts with the severity of the impairment that we've
18 been talking about now because this impairment is far more
19 substantial than most of the examples you see in the case, and
20 it results in the nullification forever of a half year of
21 income, and is inconsistent with the parties' reasonable
22 expectation.

23 Because when you enter these guaranty agreements, the
24 reasonable expectation is simple, if there's a default, this
25 other person is going to pay, and that's what that other person

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1 signs up for. And this suggests that, I think, this Court
2 needs to engage in a more searching analysis here than what the
3 city suggests to analyze that -- to address, No. 1, does the
4 impairment extinguish the economic bargain under the contract?
5 And this is one of the most important factors that courts look
6 at because debt repudiation is simply not a part of the
7 analysis. And like I said before, the Guaranty Law flunks that
8 test because it takes the debt and extinguishes it with no
9 recourse and forever.

10 Second. The impairment has to be temporary and
11 limited to the duration of the emergency. Now, defendants say
12 in their briefs, they argue that this is shaped temporally to
13 the shape of the emergency because these six months were a
14 reasonable estimation of the emergency. But again, that's not
15 right because all that says is that six months of income are
16 extinguished completely as a debt. So, and as we know, that
17 may get extended to a year, perhaps more.

18 Now, the third thing is that the impairment has to be
19 limited to reasonable conditions as to relief eligibility and
20 the amount at issue. And that's not present here either. This
21 serves a much broader swath of businesses than it needs to, and
22 there's really no conditions on who it affects.

23 And the fourth thing I think, and this came up in the
24 *Elmsford* case that the city cites, Judge McMahon found it very
25 important -- and courts long have found it important, all the

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1 way from the *Blaisdel* case to the recent *Elmsford* case -- to
2 look at whether the impairment -- whether legislation that
3 creates a substantial impairment has a mechanism to make people
4 whole. And the Guaranty Law has none.

5 And I think that analysis, your Honor, is really
6 summed up nicely by the Supreme Court in its decision in *Allied*
7 *Structural Steel*, and that summary is at page 250. But it goes
8 through very succinctly about the law not being temporary, it's
9 irrevocable, it's retroactive, and it was a law that only
10 applied to a very narrow group of people, as opposed to a broad
11 public purpose.

12 So the one other aspect that I think is notable about
13 the Guaranty Law, your Honor, and I think deserves a look, has
14 to do with the cases that tell us that contractual impairment
15 is affecting narrow classes of people at the expense, the zero
16 sum expense, of other classes, speaks to a legislative
17 impairment that is not reasonable and necessary to achieve a
18 broad public purpose.

19 Now, courts examining, for example, a restriction on
20 commercial leasing recognize that where a law benefited a
21 narrow class of commercial tenants, with the potential for
22 unintended consequence, and taking money out of that class'
23 pockets and putting it into another, that was too narrow to
24 serve any broad purpose, even if there was a legitimate one.

25 And I think here Speaker Johnson said in the hearing

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1 for this that the purpose here is to help small business
2 owners, but this is not an instance where that assistance is
3 going to accrue to the public fisc, like in *Buffalo Teachers*.

4 THE COURT: But why not? I mean, isn't it important
5 for small businesses to have people who are willing to act as
6 guarantors?

7 MR. CRUZ: I think it's very important for people who
8 are willing to act for small businesses, to have people that
9 are willing to act as guarantors. But I think the distinction,
10 again, between a broad public purpose of helping small
11 businesses is even narrower. This is a law that is aimed at
12 taking debt of guarantors and extinguishing it forever.

13 And what's important is, and this is what you don't
14 find in cases that uphold impairments, it is done at the
15 expense and at the targeted expense of another narrow class of
16 people. And I think that the key cases to look at here, your
17 Honor, are the Eighth Circuit's decision in the *Equipment*
18 *Manufacturing* case, where there they had an example of a case
19 of a -- of legislation that affected the relationships,
20 contractual relationships between manufacturers and
21 distributors of a lot of different farm equipment.

22 And to the extent those laws, as the Eighth Circuit
23 said, directly adjusted the rights and responsibilities of
24 those narrow classes of contracts, despite what the legislature
25 thought might have accrued to the public, that was too narrow

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1 to serve any public purpose.

2 And I think here the issue is really that what the
3 Guaranty Law succeeds in doing is taking money from one group
4 and giving it to another group. And Ms. Yang is a great
5 example of that because she was forced to completely give up
6 that six months of rent without the ability to enforce her
7 guaranty, just to get another income stream in the door.

8 And, your Honor, the last point I just want to come
9 back to -- and I think we hit on this briefly but I think it's
10 worth thinking about twice -- is that the city brings up the
11 idea that the remedies between leases and guaranty agreements
12 are somehow interchangeable. I think for the reasons I talked
13 about, that Judge McMahon spoke of in the *Elmsford* decision,
14 leases are completely distinct and they have their own set of
15 remedies.

16 But the key here is that the guaranty is a distinct
17 contractual obligation between the landlord and a third party,
18 not the landlord and the tenant. And it's always meant to be
19 independent of the lease obligations, with different reasonable
20 expectations, different parties, different obligations and
21 different remedies.

22 And I think, as a practical matter, the idea that
23 they're interchangeable doesn't work because of all of those
24 distinctions and the fact that the guaranty is put in place as
25 a remedy of last resort when remedies scale under the lease.

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1 And then as a matter of law, I think if you look at
2 the *Worthen* case from the Supreme Court -- and this is one of
3 the depression-era cases that came along with *Blaisdel*, but
4 it's one of the seminal cases in this area -- the Supreme Court
5 there struggled with the issue that held and I think that case
6 stands for the proposition that even taking one remedy away
7 under a contract, even if there are other remedies to be had,
8 it's sufficient to create an unconstitutional impairment under
9 the contracts clause.

10 So with that, unless your Honor has further questions,
11 I'm going to turn it back to --

12 THE COURT: I don't. I have one more question for
13 Mr. Younger on the First Amendment issue.

14 MR. CRUZ: Thank you, your Honor.

15 THE COURT: Thanks.

16 I just want to look again at the Commercial Harassment
17 Law, and I know we talked a little bit about the savings clause
18 and the fact that there's a savings clause in the Commercial
19 Harassment Law and that there isn't one in the Residential
20 Harassment Law.

21 But what's the harm here to your clients, what are you
22 worried about, given that there is this very clear language
23 that a landlord's lawful termination of a tenancy, lawful
24 refusal to renew or extend a lease or other rental agreement or
25 lawful reentry and repossession cannot constitute commercial

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1 tenant harassment?

2 MR. YOUNGER: None of those things are suing for rent.
3 They have to do with terminating a lease or getting the tenancy
4 back, which you can't do, given the moratorium. None of them
5 have to do with a lawsuit to sue to collect rent or a demand
6 for such rent, and the city's admitted that. The city's
7 admitted that those words don't appear there.

8 In fact, they're relying on a different savings
9 clause, a savings clause about nothing relieves a tenant from
10 having to pay rent. But that also does not say that you can
11 send a rent demand, and the case law in New York is very clear.
12 If you're relying on a savings clause, you read it narrower.
13 You don't read words into it. If it's not in there, it's
14 here's the law, and then here are the things we take out of it.
15 You have to read it narrowly.

16 You can't imply something into a savings clause, and
17 that's what the city is trying to do is to imply that, well,
18 you know, you can also be saved by sending a rent demand
19 because those words aren't in the statute.

20 THE COURT: Okay. And then lastly, I'm going to ask
21 you just to be very brief with respect to preemption because
22 I'm going to have to adjourn today at 5:00 and I want to give
23 defense counsel adequate time.

24 So on preemption, what State law do the Harassment
25 Laws conflict with?

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1 MR. YOUNGER: Okay. So they conflict with three laws:
2 One, first, section 29(a), which gives the Governor power to
3 both issue directives and specify the procedures for its
4 directives. One of those directives he specifically -- this is
5 202.3 and then repeated later on in things like 202.55.1. He
6 says: I am preempting and suspending any inconsistent local
7 law. So he's already done that.

8 Two. The city's laws are trying to spell out the
9 consequences of the Governor's closure orders. The legislature
10 gave that power to the Governor. The Governor is the only one
11 that has the power to specify the process for enforcing his
12 orders. Yet, the city is trying to take that power from him.

13 But then there is a third conflict, as well, and this
14 is the basic conflict. Essentially, if you look at all of
15 these laws together, first, 29(a) and then the Safe Harbor Act
16 and the Rent Relief Act, together they have a carefully crafted
17 policy. You cannot bring an eviction proceeding. You get rent
18 relief in some limited ways. Like, you know, you can't get a
19 late fee. You can't -- you know, you can have your security
20 deposit used. But those laws specifically say that you can
21 bring a rent claim, and that's the inconsistency here.

22 And what's never mentioned in the city's brief is the
23 Guaranty Law. So the State law specifically says you can sue
24 for rent. The Guaranty Law specifically says you can't sue the
25 guarantor for rent. A complete clash. But you don't just have

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1 a clash, you can also have a conflict if there are added
2 protections and added burdens.

3 But there's a second point, which is barely mentioned
4 in the city's brief, which is field preemption. We have a
5 crisis here in New York, and we have one leader of that crisis.
6 It's the Governor. He's been appointed by the legislature in
7 section 29 as the leader, the commander in chief under our
8 Constitution.

9 And that Governor has laid out very, very specific --
10 and you pointed to some of them -- you know, areas of Covid-19
11 relief in real estate. And the legislature itself, in both the
12 Safe Harbor Act and the Rent Relief Act, come up with a
13 carefully balanced plan.

14 And one of the things that the Court of Appeals said
15 in *Albany Builders*, which is not disputed, is if you have a
16 statewide industry, like the real estate industry, preemption
17 is even more important. And we see that, you know, really
18 critically today with so many people leaving the city to go
19 upstate. Our real estate markets are interconnected.

20 So it would just be a maelstrom if every county and
21 city could create their own sets of Covid-19 real estate laws,
22 when the State legislature and the Governor have already done
23 that. It would upset that balance.

24 THE COURT: Sorry. Let me, on field preemption,
25 executive order 202.3 prohibits local governments from "issuing

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1 any local emergency order inconsistent with, conflicting with,
2 or superseding the foregoing directives."

3 I mean, why doesn't that implicitly allow local
4 ordinances that don't conflict or supersede the executive
5 orders?

6 MR. YOUNGER: Well, there are two points. One, it
7 also suspends any laws that are in conflict with the directive,
8 and we believe for three reasons they're in conflict.

9 But even that aside, if you have field preemption,
10 field preemption says, you know, if you can imply from a
11 comprehensive scheme -- and it's a very comprehensive scheme
12 of, you know, first, a moratorium on evictions, and then in
13 exchange for that, certain protections around rent, but you can
14 still sue for rent. If you then add further prohibitions on
15 collecting rent, it upsets that comprehensive scheme, and
16 that's the point of field preemption. And you see it from a
17 comprehensive set of regulations like this.

18 THE COURT: Okay. All right. Well, thank you.

19 I'm going to hear from defense counsel now.

20 Thanks very much.

21 MR. YOUNGER: Thank you.

22 THE COURT: And I just want to start with one quick
23 question on standing. I want to be clear on the city's
24 position on standing. Your position is that plaintiffs had
25 standing to challenge the Harassment Laws even though there's

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1 ultimately no injury, in your view; is that right?

2 (Pause)

3 MS. KOPLIK: I'm sorry.

4 THE COURT: It's all right.

5 MS. KOPLIK: Okay. So I'm sort of taken aback a bit.
6 I'm just looking for -- Okay. So the plaintiffs do have
7 standing. However, we did not argue in our brief that it was a
8 standing -- there was any standing issue based upon a 12(b)(1)
9 motion.

10 We argued, and we thought the better argument was,
11 that they failed to state a claim. They failed to state a
12 claim because the harassment laws do not prohibit or prescribe
13 demands, lawful demands for rent. It seemed to us a bit
14 circular to say there was no injury in fact and, therefore,
15 they didn't have -- that the Court lacked subject matter
16 jurisdiction based upon a 12(b)(1) argument.

17 THE COURT: All right. Okay. Thank you. You may
18 proceed.

19 MS. KOPLIK: So the instant action challenges three
20 local laws passed by the City Council and approved by the Mayor
21 in the midst of an unprecedented crisis caused by the Covid-19
22 pandemic. The Commercial Harassment Law and Residential
23 Harassment Laws protect commercial and residential tenants from
24 harassment by their landlords due to Covid-19.

25 The Guaranty Law protects owners of businesses that

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1 have been subject to certain operational restrictions during
2 the pandemic and that have defaulted on their lease obligations
3 between March 7 and September 30, 2020.

4 Just by way of introduction and as a roadmap for the
5 Court, we were -- we will address the plaintiffs' -- why
6 plaintiffs' challenges fail in the following order. We'll
7 first address plaintiffs' First Amendment free speech and New
8 York State free speech claims. Then we'll address plaintiffs'
9 Fourteenth Amendment vagueness due process claim. Then we will
10 address plaintiffs' contract clause claim. Then we'll address
11 plaintiffs' conflict and field preemption claims, and we will
12 conclude with why a preliminary injunction should not be
13 granted and why preliminary declaratory relief should not be
14 granted.

15 We will begin with plaintiffs' First Amendment free
16 speech claims. Plaintiffs' First Amendment free speech claims
17 fail as a matter of law. The Harassment Laws do not implicate
18 plaintiffs' First Amendment rights. Plaintiffs' entire
19 argument is based on the false premise that the Harassment Laws
20 restrict their commercial speech by prescribing lawful demands
21 for unpaid rent or lawful descriptions of consequences for
22 failing to pay rent.

23 In fact, lawful demands for rent are not prescribed.
24 Rather, the Harassment Laws prohibit landlords from threatening
25 tenants with demands or statements on the basis of the tenant's

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1 Covid-19 status.

2 THE COURT: Yes, so let's talk about what that means,
3 "on the basis," right? So I understand that the law aims to
4 protect essential workers, people who are sick and caretakers,
5 right?

6 MS. KOPLIK: Right.

7 THE COURT: But I want to focus on section F7.4.4, a
8 person who has become unemployed, partially unemployed, or
9 could not commence employment as a direct result of Covid-19 or
10 the State disaster emergency. So can a landlord ask their
11 tenant for rent if they know the tenant has lost his job in
12 light of Covid?

13 MS. KOPLIK: It's not a matter of knowing that the
14 person has a protected Covid status. It's asking if you can
15 make lawful demands for rent if rent is owed. What's
16 prescribed is that it's based on the protected Covid status; so
17 that is the reason that the landlord is making unlawful demands
18 for rent and threatening.

19 Just because a landlord knows that a tenant does not
20 have employment, as your Honor is questioning, does not mean
21 that the demand for rent is based upon the fact that the tenant
22 doesn't have a job.

23 THE COURT: But why would a landlord ever ask for rent
24 or demand rent because someone lost their job? That makes no
25 sense. The question that I have, again, is: Can a landlord

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1 ask for rent even if he or she or it knows that a tenant has
2 lost his or her job due to Covid?

3 MS. KOPLIK: Yes.

4 THE COURT: And can they ask again? Like, and then
5 the person says: You know, I lost my job due to Covid; so I
6 can't pay my rent. Can they ask again? In a follow up --

7 MS. KOPLIK: It certainly is a facts-and-circumstances
8 test. So if it's repeated, if it's, you know, targeted
9 toward -- you know, like there was a case that was not on this
10 particular law. I don't recall that it was as to, you know,
11 directing -- requesting demands for rent from minors, that kind
12 of thing.

13 It's this repeated onslaught, demands for rent, then
14 it could rise to the level of harassment, but simply making
15 demands for rent and sending notices saying if rent is not
16 going to be forthcoming, these are the consequences, those are
17 not prescribed by the statute.

18 THE COURT: Why not? I mean, what is more threatening
19 than to threaten that someone will be evicted? What does it
20 mean to threaten someone if it doesn't mean that you're telling
21 them that if they're not paying their rent, they're going to be
22 evicted?

23 MS. KOPLIK: The question is not whether it's a
24 threat. The question is whether it arises to the level of
25 harassment. So I mean, the law prescribes, you know,

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1 threatening that rises to the level of harassment. You know,
2 semantically, I suppose saying the consequences could be deemed
3 a threat, but that threat is because the landlord lawfully
4 wants to collect -- hopefully, lawfully wants to collect money.

5 THE COURT: Yes, I guess just going back to what you
6 initially said. Give me an example of what would constitute
7 threatening a tenant based on the fact that they've become
8 unemployed because of Covid. Like what would that look like?

9 MS. KOPLIK: Okay. So perhaps a tenant makes demands
10 saying, you know, you have to -- you know, you have to pay me
11 all the rent that's due through the year because you're
12 unemployed, and if you don't pay me now, I know you're going to
13 have other costs. And it's not a lawful demand for what is due
14 and owing.

15 THE COURT: But just to be clear, the city's position
16 is that you can ask a tenant for rent under this law, right?

17 MS. KOPLIK: Correct.

18 THE COURT: You can demand rent, right?

19 MS. KOPLIK: Correct.

20 THE COURT: And then you can follow up if that rent is
21 not paid?

22 MS. KOPLIK: Correct.

23 THE COURT: And then you can send an eviction notice
24 if that rent is not paid, right? You can pursue eviction?

25 MS. KOPLIK: Correct.

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1 THE COURT: But in your view, that is not threatening
2 someone -- and I just want to get the language out -- that's
3 not harassing someone or threatening a lawful tenant? That
4 doesn't constitute a threat to a lawful tenant to say: If you
5 don't pay me your rent, I know you're out of a job because of
6 Covid, but if you don't pay your rent, I'm going to try and get
7 you evicted? That is not harassment in your view under this
8 law?

9 MS. KOPLIK: Under this law, if it is repeated,
10 argumentative threats, then it is prescribed. If it's lawful
11 for what is owed, it's not. If the tenant says because you
12 don't have a job, I am doing this, then --

13 THE COURT: That just seems so untethered to reality
14 that that's the problem, that landlords are going after people
15 saying, you know, you have to pay me more than you owe me; you
16 have to pay me in advance because now I know you don't have a
17 job. That doesn't happen very often, does it?

18 I mean, the concern is if you know someone has Covid
19 and -- excuse me, let me rephrase that. If you know someone
20 lost his or her job due to Covid and can't pay rent, the
21 question is, can you threaten to get them evicted because of
22 that, even though the cause of them not being able to pay rent
23 is due to Covid is based on them not being able to pay their
24 rent because they lost their job due to Covid?

25 MS. KOPLIK: Your Honor, regarding the residential

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1 harassment clause, the case of *Dunn v. 583 Riverside Drive* held
2 in an earlier definition of the Residential Harassment Law, it
3 rejected the tenant's claim that the receipt of a mere rent
4 demand is frivolous or conduct that constitutes harassment.

5 So, you know, this is basically an extension of, you
6 know, prior types of harassment and there is no -- there's no
7 reason to treat the challenged laws differently. Lawful
8 demands for rent is not prescribed.

9 THE COURT: Why is the absence of a savings clause in
10 the Residential Harassment Law, when there is a savings clause
11 in the Commercial Harassment Law, not evidence that the
12 legislature intended to allow demands for rent in the
13 commercial setting but not in the residential setting?

14 (Pause)

15 Sorry, do you need a minute? Can you hear me?

16 MS. KOPLIK: I could hear you. I'm sorry, your Honor.
17 I'm trying to get my head around your question. I do not know
18 the reason why there is an absence of the savings provision in
19 the Residential Harassment Law. I do know that courts have
20 interpreted the Residential Harassment Law not to construe a
21 simple demand for rent as harassment.

22 MR. UGALDE ALVAREZ: If I may add, your Honor, I would
23 just add to that, as well, that the savings clause was already
24 in the statute prior to the enactment of the Harassment Laws
25 that are being challenged here.

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1 The Harassment Laws, and our position is that the
2 Harassment Laws are clear. The meaning of the statute is clear
3 and, therefore, the savings clause is just an additional, you
4 know, point of evidence to show to the Court that a simple
5 demand for rent, accompanied with a threat of eviction, is not
6 harassment under the Harassment Law.

7 THE COURT: But is that true with respect to the
8 Residential Harassment Law? Because I don't see it in that
9 law. I only see it in the Commercial Harassment Law.

10 MR. UGALDE ALVAREZ: So, your Honor, the Residential
11 Harassment Law does not have an express savings law in the same
12 manner that the Commercial Harassment Law does. My point is
13 that that savings clause was already in place prior to the
14 enactment of these laws.

15 THE COURT: Okay.

16 MR. UGALDE ALVAREZ: Our position is that the
17 Harassment Laws are clear, and the savings clause is just an
18 additional -- it's just additional evidence that simple demand
19 for rent, accompanying with threats of eviction, are not
20 prescribed.

21 THE COURT: The Commercial Harassment Law prohibits
22 landlords from threatening a commercial tenant based on, among
23 other things, that they were impacted by Covid-19, a
24 description that includes businesses closed down due to the
25 government's executive orders. But doesn't that include

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1 virtually every business in the city? I'm happy for either one
2 of you to answer that.

3 MS. KOPLIK: Your Honor, can you repeat the question,
4 please?

5 THE COURT: Yes. So the Commercial Harassment Law
6 prohibits landlords from threatening a commercial tenant based
7 on, among other things, the fact that they were impacted by
8 Covid-19.

9 But that description includes virtually every
10 business, you know, in the city, right, I mean, because you
11 have so many businesses that were closed down due to the
12 government's executive orders?

13 MR. UGALDE ALVAREZ: Your Honor, I can answer the
14 question. I think it's important to look at the specific
15 definition in the statute. It says: A business is impacted by
16 Covid if -- and one of the conditions is -- if it was subject
17 to a seating, occupancy or on-premises service limitation
18 pursuant to an executive order issued by the Governor or Mayor
19 during the Covid-19 period.

20 That language does not cover every executive order
21 issued by the Governor. It only covers those executive orders
22 that specifically limited on-premises service in those
23 businesses. There are distinctions in the executive order.
24 Executive order 202.3 specifically is one of those orders which
25 affected restaurants, bars.

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1 But at least the way -- you know, in my view, it does
2 not cover every executive -- or I think the language is
3 specific.

4 THE COURT: All right. So I want to ask questions
5 about the Commercial Harassment Law, very similar to the ones I
6 asked about the residential ones. So if a business doesn't
7 have enough money to pay rent because it was closed due to
8 Covid, why is it not threatening that business, based on the
9 fact that they were impacted by Covid, to threaten to evict
10 them for not paying rent?

11 I mean, what would even constitute threatening a
12 commercial tenant based on the fact that they were closed as a
13 result of Covid? I mean, what does that look like?

14 MS. KOPLIK: Your Honor, I think that, you know, it's
15 really important to focus on the "based on" language, and there
16 needs to be some sort of causation. The cases that we cited,
17 that the Harassment Laws prohibit harassment based on a
18 person's or entity's Covid status, the laws are not triggered
19 merely because a tenant has one of the covered statuses.

20 It's triggered because there's a "but for" causation
21 between the plaintiffs -- between the owners', you know,
22 requests or demands for rent and that status. The plaintiffs
23 do not address any of the case law cited by the defendants
24 interpreting the meaning of "based on."

25 They never argued that -- they cite to one case, a

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1 Title VII retaliation claim, showing that the retaliatory
2 motive was that plaintiff need not show that the retaliatory
3 motive was the only cause of an employer's action. But
4 defendants never argued that the "based on" language mandates
5 that the harassment be solely based upon the person's or
6 entity's Covid status. It's that there has to be a "but for"
7 causation. So in the --

8 THE COURT: You don't think this is kind of confusing?
9 Because, you know, you have "based on" but it really doesn't
10 seem, as I said earlier, all that tethered to reality to
11 suggest that landlords are going to go after tenants because
12 they don't have money. That's not what's happening in reality.

13 What's happening in reality is that a lot of people
14 are out of jobs and can't pay their rents and had to close
15 their businesses, right?

16 And so is this not going to be confusing for, you
17 know, a whole host of landlords? Is it not vague as to what a
18 landlord can and can't do to a person or a business that has
19 been harmed by Covid?

20 MS. KOPLIK: There's nothing in the statute that says
21 that lawful demands for rent cannot be made, your Honor. Even
22 insofar as the -- you know, based upon a rent concession or
23 forbearance. Only threats based upon a prior receipt of a rent
24 concession or forbearance is not lawful under the Harassment
25 Laws, not demands for rent after a tenant receives.

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1 It's based upon -- clearly, there are other reasons
2 why other Covid statuses, why, you know, landlords may harass
3 tenants. It could be because the -- they're, you know, told
4 that this is a business of essential workers, or perhaps this
5 is a, you know, situation where the workers have already
6 contracted Covid.

7 THE COURT: No, I understand. As I said earlier, I
8 completely understand the need for a law that protects people
9 who are essential employees, who are people who have Covid or
10 have family members who have Covid. I understand that.

11 But looking at the Commercial Harassment Law, it talks
12 about threatening a lawful tenant based on a tenant's status as
13 a person, business impacted by Covid. I mean, is that not
14 pretty broad as to how a business or person could be impacted
15 by Covid? And why can that not include economic impact?

16 It's not just limited to people who had Covid or might
17 spread Covid, but who were impacted. And it goes on to say
18 that a business impacted by Covid is one that was subject to
19 seating, occupancy or on-premises service limitations pursuant
20 to an executive order issued by the Governor or Mayor,
21 et cetera, et cetera.

22 I mean, you know what it says. But I'm just trying to
23 figure out what is this Commercial Harassment Law really
24 preventing in real life? What is it preventing?

25 MR. UGALDE ALVAREZ: Your Honor, if I may add, I think

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1 all of these hypotheticals have been focused on plaintiffs'
2 intended speech, which they define as demand for rent
3 accompanied with threat of eviction.

4 The issue is that these laws are not focused on that.
5 They also are trying to prevent other acts or omissions that
6 could constitute a threat based on these impacted statuses.
7 So, you know, it is a little bit hard to think about all these
8 hypotheticals because it is a highly intensive factual question
9 that has to be decided by a judge. But I think it's important
10 to recognize that the language is broad and covers other
11 situations.

12 It may be threats of force, it may be other types of
13 threats that are based on these protected statuses. The same
14 way that, at least in the Commercial Harassment Law context,
15 that same subsection, subsection 11(1) has a list of protected
16 categories like age, race, creed, color and national origin.

17 The threat itself does not have to be specific to
18 what -- while a demand for threat accompanied with -- a demand
19 for rent accompanied with a threat of eviction could constitute
20 threat under the statute, it still has to be based on the
21 protected category.

22 And there could be other types of acts or omissions
23 that wouldn't be demands for rent, wouldn't be accompanied by
24 threats of eviction that could be threats against a commercial
25 tenant based on a protected category.

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1 So I think it has to be also mentioned that we're not
2 only talking about demands for rent that are covered by these
3 statutes and that the City Council intended to prescribe to
4 protect these tenants.

5 THE COURT: Again, I understand the need to protect
6 essential employees and persons who may have Covid. I think to
7 the extent that there is ambiguity, I think it's focused on
8 people who have been harmed financially, right, so at least in
9 part.

10 All right. You can proceed. I don't know if you want
11 to talk about the contract clause.

12 MS. KOPLIK: Well, we did have a lot more to say
13 about, you know, the *Central Hudson* test and plaintiffs' State
14 free speech claim.

15 THE COURT: Go ahead.

16 MS. KOPLIK: Okay. So even if the Harassment Laws
17 implicate plaintiffs' First Amendment rights, the city's
18 interest in -- they only implicate commercial speech. And the
19 city met its burden on showing that it has a substantial
20 interest and that the laws directly and materially advance that
21 interest.

22 The city relied on a lot of evidence in the hearings.
23 Plaintiffs tried to play this down, but there were several
24 committee hearings, multiple hours of oral testimony, hundreds
25 of pages of written testimony. They considered reports and

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1 articles on the economic impact of the pandemic.

2 Under *National Electric Manufacturers Association*,
3 commercial speech is subject to a less-stringent constitutional
4 requirement than other forms of speech. This law is narrowly
5 tailored. It prescribes harassment based on the Covid status.

6 Plaintiffs mischaracterize the law as inhibiting
7 lawful demands for rent. They cherry pick comments from
8 unnamed legislatures, and they don't look at the public
9 testimony as a whole.

10 They allege that they should have been more narrowly
11 tailored to apply to tenants who actually suffered a financial
12 hardship. But substantial government interest was to prescribe
13 harassment not just for those who suffered financial hardship
14 but for others who could be targets of harassment, as we've
15 already discussed, such as those who have Covid-19 or essential
16 workers. Plaintiffs' State free speech claim should also be
17 dismissed.

18 The Court should decline to exercise supplemental
19 jurisdiction. To the extent that it decides to exercise
20 supplemental jurisdiction, the Court should dismiss, for the
21 same reasons, that the plain meaning of the Harassment Laws
22 does not prescribe plaintiffs from making lawful demands for
23 rent.

24 In *Central Hudson*, the court stated: The New York
25 State Constitution does not afford heightened free speech

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1 protections to commercial speech. We also cited to *Clear*
2 *Channel Outdoor, Inc. v. City of New York*.

3 Plaintiffs never articulated a reason why their State
4 free speech claims should differ and only said that it should
5 mirror their First Amendment arguments. Regarding the cases
6 cited, none of the cases cited by plaintiffs support that the
7 State Constitution is more protective than the federal
8 Constitution in the -- in free speech claims.

9 Your Honor, just also one thing on the
10 void-for-vagueness claim. The Harassment Laws give plaintiffs
11 a reasonable opportunity to know what conduct is prohibited and
12 provide, on their face, explicit standards for courts to rely
13 upon when reviewing harassment claims.

14 The Court -- also, the plaintiffs should not be
15 allowed to expand their previously argued First Amendment
16 vagueness claim for a Fourteenth Amendment vagueness claim that
17 they are now seemingly trying to assert. And on that note, I
18 can turn it over to Carlos Ugalde for the guaranty clause.

19 THE COURT: Thank you.

20 MR. UGALDE ALVAREZ: Thank you. In the interest of
21 time, I'm just going to address a few of the arguments that
22 opposing counsel was making in the context of the contract
23 clause claim.

24 First of all, opposing counsel, once again, mentions
25 the Yang plaintiffs who have now withdrawn their contract

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1 clause claim. Just for the record, your Honor, and as we
2 repeatedly stated, the Yang claimants do not have standing to
3 challenge the Guaranty Law under the contract laws because the
4 guarantor at issue in that contractual relationship was also a
5 tenant under the lease, and the Guaranty Law does not cover
6 those types of guaranties.

7 With respect to the substantial impairment prong, your
8 Honor, I think we have to emphasize what the inquiry is. It
9 has to substantially impair plaintiffs' contractual
10 relationships.

11 Plaintiffs attempt to separate the guaranty agreement
12 and the lease agreement, but that cannot be done. They are
13 inextricably intertwined, your Honor. We've cited to an
14 Appellate Court case in the State of New York, Second
15 Department, which confirms that the lease and the guaranty
16 agreement are part of the same transaction and that the
17 guaranty is entered into to induce the landlord to enter into a
18 lease with the commercial tenants.

19 Plaintiffs' own declarants have confirmed that. They
20 even say that the guaranty agreement benefits the tenants.
21 Their attempt to separate both agreements cannot -- you know,
22 has to be rejected. And, therefore, given that the inquiry is
23 whether or not the Guaranty Law substantially impairs
24 plaintiffs' contractual relationships, we do have to consider
25 the remedies under the lease when determining, you know, where

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1 there has been substantial impairment.

2 We have pointed -- even though the Bochner plaintiffs
3 came in basically a few days ago, we can point to several
4 remedies under the lease, which are clearly entered into and
5 agreed upon by tenant and the landlord; so that the landlord
6 can enforce the central term of the lease, which is to recover
7 unpaid rent.

8 That is also the central term of the guaranty
9 agreement, but the guaranty agreement just simply adds a remedy
10 so that the landlord can go after the guarantor when the tenant
11 does not pay. The implication of that is that, in the context
12 of this emergency, your Honor, due to the closure orders, we
13 have a number of businesses, like restaurants, bars, which are
14 closed and clearly are unable to pay rent as a result, which
15 would give the landlords an ability to go after the assets of
16 these guarantors, which are generally the same principals of
17 those commercial tenants.

18 And that is clearly the goal that the City Council was
19 trying to achieve in enacting the Guaranty Law. However, and I
20 don't want to jump to the next prong, but I do want to note
21 that the goal or the purpose of the statute is to respond to
22 the crisis, the economic crisis that is ensuing as a result of
23 the Covid-19 pandemic. While this measure is specific to these
24 to commercial tenants and guarantors, it is clearly a measure
25 to address one of the worst crises that this country and this

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1 city has ever faced.

2 THE COURT: Can I ask you something?

3 MR. UGALDE ALVAREZ: Yes, your Honor.

4 THE COURT: I wanted to hear your response to
5 plaintiffs' counsel's argument regarding the fact that this
6 extinguishes the debt that the guarantor has forever, and why
7 was that appropriate here? And why does that withstand
8 constitutional muster?

9 MR. UGALDE ALVAREZ: Right. Your Honor, so I think
10 it's worth going back to one of the questions you asked
11 opposing counsel. Specifically, you pointed to *Buffalo*
12 *Teachers*, and a set of other cases where there were wage
13 freezes.

14 While in those cases the measure was temporary, the
15 impairment was also permanent in that for the time period that
16 the regulation in those cases was present, clearly, the
17 teachers were not receiving the wages they should have been
18 receiving. That is the same situation here, that the Guaranty
19 Law is temporary in that it has a limited time period, from
20 March 7 to September 30th. And, therefore, for defaults
21 occurring during that time period, the landlord would not be
22 able to recoup any default from the guarantor itself, but that
23 was also the case in these other cases.

24 I would also point to *Twentieth Century Associates v.*
25 *Waldman*, which is a New York Court of Appeals case. In that

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1 case, the regulation at issue was a rent ceiling on commercial
2 spaces that was tied to the crisis that ensued after the World
3 War, World War II. And in that case, obviously, the rent
4 ceiling, while temporary, prevented the commercial landlords
5 from getting a benefit that they would have otherwise received,
6 and that is the same situation here, your Honor.

7 There was also -- and just going back to the point
8 regarding the fact that the guaranty and that the lease has to
9 be considered. Since they're part of the same contract
10 relationship, I do want to address plaintiffs' counsel's
11 comment that the remedies from their lease are illusory.

12 *Elmsford Apartment Associates*, a recent case in this
13 circuit -- in this district, while that case involved a
14 different type of regulation, which is temporary in its own
15 sense, in that case, the court completely rejected any
16 implication that remedies, such as going to court to enforce a
17 lease to seek eviction or to get a judgment for unpaid rent, is
18 illusory. That was completely rejected. The court -- so
19 that's what I would say about that, your Honor.

20 In terms of the -- and I think, your Honor, in terms
21 of the second prong, which is, you know, whether or not the
22 city had a significant, legitimate interest, I think I have
23 already addressed that. But I do want to point out several
24 cases, including *Buffalo Teachers*, that explicitly held that
25 addressing fiscal and economic emergencies are deemed

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1 legitimate public interests.

2 And finally, your Honor, and I think this is the last
3 couple of statements that I will make regarding the contract
4 clause. With respect to the third prong, which is whether the
5 impairment is based upon reasonable conditions and is of a
6 character appropriate to the public purpose, justifying the
7 legislation, I do want to note that plaintiffs' counsel is
8 trying to merge this test with the first -- this prong with the
9 first prong of the analysis.

10 Opposing counsel cited *Elmsford Apartments* in support
11 of their arguments with respect to this prong. However,
12 *Elmsford Apartment* ended the inquiry after the first prong. So
13 there was no reasoning that could really help plaintiffs in
14 that regard.

15 But I think the important things to note, your Honor,
16 is that there is substantial deference owed to the City
17 Council. The test is, you know, whether or not the legislation
18 is self-serving. In this case, the Guaranty Law impairs
19 private and public contracts alike and, therefore, substantial
20 deference is owed.

21 THE COURT: Just let me stop you there.

22 MR. UGALDE ALVAREZ: Yes, your Honor.

23 THE COURT: Just, why don't you -- and I know we're a
24 little past 5:00, but I don't want to cut you off.

25 Just tell me why this is reasonable and necessary to

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1 advance the public interest? Why is it that you have to
2 extinguish these debts entirely to advance the public interest
3 here?

4 MR. UGALDE ALVAREZ: Well, your Honor, I just -- you
5 know, the city's position is not -- is that the Guaranty Law is
6 only impairing one remedy that's available to the landlord. So
7 it does not extinguish the debt, which is the unpaid rent. The
8 landlord can still go after --

9 THE COURT: But these are in situations, as a
10 practical matter, the tenants can't pay, right? That's why the
11 guaranty kicks in in the first place. So as a practical
12 matter, the guaranty is the way to recoup the losses. No?

13 MR. UGALDE ALVAREZ: So, your Honor, two things. In
14 situations where there is no guaranty, the only remedy that a
15 landlord would have is to enforce the remedies under the lease.
16 The point that plaintiffs are making is that -- is making is
17 that these tenants, these commercial tenants, presumably have
18 no assets and, therefore, they can't really recover.

19 But what we're talking about here, the Guaranty Law
20 covers a very specific set of businesses. There is --
21 notwithstanding plaintiffs' contentions, there is an injury
22 requirement in the statute. It only covers restaurants or
23 bars, gyms, fitness centers, movie theaters, personal care
24 services, and non-essential retail businesses. So there is an
25 injury requirement, and these businesses, by nature, have

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1 assets such as inventory and equipment.

2 So I think it is important to know that the Guaranty
3 Law is not only reasonable because it is narrow to only cover
4 businesses that have been affected by the closure orders issued
5 by the Governor in response to the Covid-19 pandemic, but those
6 businesses by being -- by virtue, retail businesses,
7 restaurants or bars, do have assets. So the claim that it's
8 just illusory to be able to enforce lease remedies against
9 these commercial tenants has to be rejected.

10 Additionally, your Honor, with respect to this prong,
11 the Guaranty Law is based upon reasonable conditions. It
12 only -- as I previously mentioned in relation to my comment
13 regarding the Yang plaintiffs -- it only covers natural persons
14 that are guarantors, who are not tenants. There is an injury
15 requirement, as I just said.

16 There was narrowing in that the City Council
17 considered other alternatives. Specifically, the Council
18 proposed initially a legislation that would have covered
19 virtually every business in the city that would have met a
20 revenue loss requirement. The Council, recognizing that the
21 law needed to be, you know, tied to the crises and to the
22 actual need, narrowed the law to only cover the businesses that
23 have been affected by closure orders.

24 And finally, your Honor, the temporal scope that I had
25 already mentioned in the context of the first prong, but all of

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1 these measures, your Honor, make it clear that the character of
2 the Guaranty Law was appropriate to the public --

3 THE COURT: You talk about the temporal -- I didn't
4 mean to cut you off, but when you talk about the temporal
5 scope, you mean because it's limited in terms of time? But
6 isn't the city seeking to expand the time, the temporal scope
7 of the provision?

8 MR. UGALDE ALVAREZ: Your Honor, with respect to the
9 proposed legislation, I have two things to say. The city's
10 position is that that should not be considered in the analysis
11 at this stage.

12 First of all, that legislation has not become law and,
13 therefore, is not part of this challenge. And secondly, as
14 noted in the letter that we submitted when we notified the
15 Court about this proposed legislation, that legislation is
16 subject to change. You know, it has to go through committees
17 and has to be referred to the City Council for a vote.

18 So there still could be amendments made to that
19 legislation, but more importantly, it's not part of the law yet
20 and it's not part of this challenge and should not be
21 considered in the analysis at this stage.

22 But, your Honor, my final point with respect to the
23 contract clause is that the Guaranty Law is of a character
24 appropriate to the public purpose. As noted, the public
25 purpose here, which is significant and legitimate, is to

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1 address the economic crisis. And the law itself was narrowed
2 by time period. The time period is tied to the crisis, and the
3 businesses that are protected are businesses that have been
4 affected by the closure orders.

5 So, your Honor, I think that's all I have for the
6 contract clause.

7 THE COURT: Thank you very much.

8 So we're really running over. I'm just going to ask
9 plaintiffs' council if you have just one short, you know, brief
10 rebuttal, but keep it very short, please.

11 MR. YOUNGER: Yes, I'll do my best. I think I'm
12 unmuted now.

13 I want to follow up your Honor's question about
14 unemployment. This is a critical question because it points
15 out what the VOLS' amicus said. The unemployment is the cause
16 of the nonpayment, and that is 730,000 New Yorkers just there.
17 But it's not just that, it also includes people who couldn't
18 start a job. So you have more New Yorkers who will say, I
19 couldn't get to my job; I couldn't start my new job; so I
20 couldn't pay my rent. So it shows just how circular this thing
21 is.

22 And the same with rent concession. You didn't pay
23 your rent concession and, thus, you're guilty of harassment. I
24 think that counsel for the city misstated the commercial
25 harassment. If you look at subdivision 7(c), it's not confined

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1 to the Governor's orders that are in-premises. It is any
2 closure as a result of the State disaster emergency, and that's
3 virtually every business in the city, as your Honor said.

4 And your Honor pointed out a Covid-19 diagnosis, but
5 bear in mind, 40 percent of the people who were diagnosed had
6 no symptoms; so they're not even affected really and, yet, they
7 can take the benefit of this law. And that points up why the
8 lack of a substantial injury requirement makes this completely
9 overbroad.

10 In terms of the guaranty issue, the city hasn't cited
11 a single case where a court has upheld a private debt that has
12 been forever extinguished with no remedy to the plaintiff.
13 There's not a single case that they've cited for that.

14 And they try to say, well, there are these other
15 remedies and they point to *Elmsford*. Well, look at the
16 application of *Elmsford* here. You can't evict, and you can't
17 sue the only person that has assets. They try to speculate
18 about things. Well, they might have fixtures. Everywhere you
19 notice, as the Golino declaration says, that those are covered
20 by other liens.

21 And if you look, come back to Mr. Bochner, over a
22 hundred thousand dollars he's out. That is substantial injury
23 by any stretch of the imagination. Thank you.

24 THE COURT: Thank you all for your advocacy. I'm
25 going to reserve decision. I hope you all stay safe and

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1 healthy. Thank you for your advocacy today.

2 And thank you, Rose. Thank you to the court reporter.

3 Have a nice weekend.

4 MR. YOUNGER: Thank you, your Honor. We appreciate
5 it.

6 MS. KOPLIK: Thank you.

7 MR. UGALDE ALVAREZ: Thank you, your Honor.

8 (Adjourned)